No. 86-327

In the Supreme Court of the United States

OCTOBER TERM, 1987

MULLINS COAL COMPANY, INC.
OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAM, UNITED STATES DEPARTMENT
OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF AUTHORITIES

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The federal respondent offers this reply brief to bring to the Court's attention several recent courts of appeals' decisions relevant to this case. We believe that the arguments presented in our main brief adequately address the arguments raised by the United Mine Workers and by respondents Stapleton and Ray and thus do not specifically reply to their briefs at this time.[1] We note, however, that some recent decisions, by restricting methods of rebuttal, have led us to alter the view expressed in our

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[1] We note that respondent Stapleton's entire argument appears to be an attack on the court of appeals' conclusion that the presumption of disability, although properly invoked by the administrative law judge (ALJ), had been rebutted in his case. Because certiorari has been sought solely on the issue of the type of evidence that invokes the presumption, and respondent Stapleton did not file a cross-petition, his attempt to attack the court of appeals' decision on this ground is precluded. See Sup. Ct. R. 21.1(a).

opening brief (at 16-17, 33-34) that the Fourth Circuit's ruling on invocation will not change the outcome in a significant number of federal black lung cases litigated under the interim Part C regulations.

1. In the past few months, several courts of appeals have clarified their positions regarding the invocation issue presented here. The Seventh Circuit in *Cook* v. *Director, OWCP,* 816 F.2d 1182 (1987), has squarely rejected the holding of the Fourth Circuit in this case and concluded that the interim presumption may be invoked only by a preponderance of the evidence in each category. The Sixth Circuit has reaffirmed its conclusion that x-ray evidence must be weighed before invocation under Subsection (a)(l), see *Back* v. *Director, OWCP,* 796 F.2d 169, 172 (1986), and extended that ruling by holding that ventilatory function and blood gas studies must be weighed under Subsections (a)(2) and (3). *Prater* v. *Hite Preparation Co.,* No. 86-3653 (6th Cir. Sept. 22, 1987). The same court, however, has also suggested that claimants' burden of proof to invoke under Subsection (a)(4) remains an open issue suitable for resolution by the Benefits Review Board. *Patton* v. *Director, OWCP,* No. 85-3781 (6th Cir. Aug. 3, 1987).[2] Finally, although the Third Circuit continues to adhere to the view of the en banc Fourth Circuit below, it has retracted its view that the Director's position on invocation was a recently formulated litigation position. See *Revak* v. *National Mines Corp.*, 808 F.2d 996, 1004 (3d Cir. 1987) (opinion sur denial of panel rehearing).[3]

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[2] Copies of *Patton* were submitted to the Court and parties earlier. On September 16, 1987, the court of appeals denied a petition for rehearing en banc on rebuttal issues in the case; a petition for rehearing addressed to the panel on the Subsection (a)(4) invocation issue is still pending. Copies of *Prater* are submitted with this reply brief.

[3] The Tenth Circuit, without any discussion of the other courts of appeals' decisions, recently held that it is not clearly erroneous to deny invocation where a positive x-ray is re-read as negative. Compare *Plutt* v. *Benefits Review Board,* 804 F.2d 597, 598 (10th Cir. 1987) (per curiam) with *Haynes* v. *Jewell Ridge Coal Corp.*, 790 F.2d 1113, 1114 (4th Cir. 1986).

2. We stated in our opening brief (at 16-17) that the court of appeals' conclusion in this case—that the presumption in 20 C.F.R. 727.203(a) may be invoked by one piece of qualifying medical evidence—should have little practical effect on the disposition of claims under the interim regulations. The basis for that assertion lies in the "true doubt" rule, which requires that the claimant prevail on those issues as to which the evidence is in equipoise. In view of that rule, the Director's requirement that the claimant prove the basic invocation facts by a preponderance of the evidence appears to have much the same effect as the Fourth Circuit's imposition of a preponderance burden for all issues on the rebutting party. In either scheme, close calls go to the claimant.

The results, however, will only be the same under the Fourth Circuit's rule if all relevant evidence (including evidence that was insufficient to invoke the presumption) is considered and weighed in the rebuttal stage. We understood the Fourth Circuit's position on invocation to be balanced by a requirement that all relevant evidence be considered on rebuttal.[4] If some items of relevant evidence are not considered or not given their proper weight on rebuttal, then the general congruity between the invocation stage and the rebuttal stage would be disrupted and the Fourth Circuit's rule on invocation would indeed make a difference to the outcome of a significant number of cases.

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[4] In its decision, the court of appeals limited consideration of the medical evidence on rebuttal only to the extent that a single negative x-ray cannot rebut the presumption, as 30 U.S.C. 923(b) provides. See Pet. App. 27a, 53a, 99a.

For example, suppose a miner has a single qualifying ventilatory function test and a number of nonqualifying tests which the ALJ determines are more reliable. Under the Director's view, the miner would be unable to invoke the presumption under Subsection (a)(2) because his "[v]entilatory studies [do not] establish the presence of a chronic respiratory or pulmonary disease." Under the Fourth Circuit's view, the single qualifying test would be sufficient to invoke the presumption of disability due to pneumoconiosis. On rebuttal, therefore, the mine owner (or Director) must be able to use the nonqualifying test results to rebut that presumption by showing that the miner—even if he is disabled by some other cause, such as a heart attack—does not in fact have a "chronic respiratory or pulmonary disease." The same general symmetry should apply to blood gas studies used to invoke the presumption under Subsection (a)(3) and to "other medical evidence" under Subsection (a)(4). Such symmetry will enable the mine owner to rebut (on the Fourth Circuit's view) what the miner would have been unable (on the Director's view) to establish in the first place.

Recent courts of appeals decisions, however, by disrupting this general symmetry, suggest that in fact the method of invocation will alter the outcome in a significant number of cases. These courts have, in one way or another, restricted the rebuttal use of evidence tending to establish the absence of a totally disabling pulmonary or respiratory impairment (*e.g.*, nonqualifying ventilatory studies or blood gas studies or medical reports), evidence which, under the Director's view, might have defeated invocation. For example, several courts have held that such evidence is irrelevant to rebuttal [redacted] under Subsection (b)(2), which focuses on a miner's ability to do his usual coal mine work or comparable and gainful work. See, *e.g.*, *Roberts* v. *Benefits Review Board*, 822 F.2d 636, 638 (6th Cir. 1987); *Sykes* v. *Director, OWCP*, 812 F.2d

890, 893-894 (4th Cir. 1987); *Wetherill* v. *Director, OWCP*, 812 F.2d 376, 380 (7th Cir. 1987) (dicta); *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158, 162 n.5 (3d Cir. 1986) (dicta). These courts rejected the Director's contention that the miner's inability to work must stem, not from any physical cause, but from a pulmonary or respiratory impairment. The courts held that the cause of the miner's inability to work is irrelevant under Subsection (b)(2) and that the absence of a respiratory or pulmonary impairment is only relevant, if at all, under Subsection (b)(3), which requires the party contesting eligibility to "establish[] that the total disability or death of the miner did not arise in whole or in part out of coal mine employment," or Subsection (b)(4), where the contesting party must disprove the existence of pneumoconiosis.

These same courts, however, have also indicated that the rebuttal burden under Subsection (b)(3) is especially onerous. *Adkins* v. *United States Dep't of Labor, OWCP*, 824 F.2d 287, 290 (4th Cir. 1987); *Roberts* v. *Benefits Review Board*, 822 F.2d at 639; *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123-124 (4th Cir. 1984). It is not at all clear from these cases that proof that a claimant suffers no totally disabling pulmonary or respiratory impairment is a viable method of Subsection (b)(3) rebuttal. Compare *Roberts* v. *Benefits Review Board*, 822 F.2d at 639, with *Wright* v. *Island Creek Coal Co.*, 824 F.2d 505, 508-509 (6th Cir. 1987). Nor does it appear that Subsection (b)(4) rebuttal, which requires proof of the absence of pneumoconiosis, is congruent with proof that a miner has no totally disabling pulmonary or respiratory impairment. See, *e.g.*, *Pavesi* v. *Director, OWCP*, 758 F.2d 956, 965 (3d Cir. 1985).[5]

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[5] It should be stressed that a miner can have simple pneumoconiosis, as evidenced by x-rays, without suffering from a disabling respiratory or pulmonary disease stemming from the pneumoconoisis. Conversely, a miner can have a disabling respiratory

If proof that a miner is not totally disabled by a pulmonary or respiratory disease is unavailable as a method of rebuttal, then the crucial premise of the court of appeals' ruling—that all relevant medical evidence not weighed on invocation would be weighed on rebuttal (Pet. App. 27a, 53a, 99a)—is called into question, as is compliance with the statutory requirement that all relevant medical evidence be considered in deciding claims (30 U.S.C. 923(b)). In our view, this apparent trend toward a restrictive reading of the rebuttal categories—unless otherwise reversed—provides a strong argument, in addition to those advanced in our opening brief, for accepting the Director's view that a claimant may invoke the presumption only by a preponderance of the medical evidence in a particular category.

The court of appeals' decision should be reversed and the case remanded for reconsideration of the administrative decisions under the proper legal standard.

Respectfully submitted.

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or pulmonary disease without suffering from pneumoconiosis. The two questions are medically distinct and, thus, must remain distinct on rebuttal. Otherwise, a miner who has simple pneumoconiosis as shown by x-ray evidence, but does not have any disabling respiratory or pulmonary disease, and yet is unable to work for a completely different reason (such as a heart attack or a car accident) would be entitled to benefits as if he were disabled by the pneumoconiosis.

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